90-737

No. ____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

DAVID B. ZAVADIL and BARBARA ZAVADIL,
Petitioners

v.

UNITED STATES OF AMERICA, acting by and through the DEPARTMENT OF ARMY, U.S. ARMY CORPS OF ENGINEERS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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October 9, 1990

QUESTION PRESENTED

Whether the United States is immune from liability pursuant to 33 U.S.C. § 702c (1980) (Flood Control Act of 1928) for personal injuries caused by the negligent operation of a recreation area within a flood control project when that negligence is unrelated to flood control.

LIST OF PARTIES

The parties to the proceedings below were the petitioners David B. Zavadil and Barbara Zavadil (Zavadils) and the respondent United States of America, acting by and through the Department of Army, U.S. Army Corps of Engineers (United States).

SPECIAL NOTE

This Petition raises nearly identical issues as raised in a pending petition for a writ of certiorari, Supreme Court Case No. 90-147, entitled Fryman v. United States.

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Petitioners

v.

UNITED STATES OF AMERICA, acting by and through the DEPARTMENT OF ARMY, U.S. ARMY CORPS OF ENGINEERS, Respondent

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

David Zavadil and Barbara Zavadil respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 11, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 908 F.2d 334, and is reprinted in the appendix hereto, p. A-1, infra.

The memorandum opinion of the United States District Court for the District of Nebraska is reported at 715 F. Supp. 276, and is reprinted in the appendix hereto, p. A-7, infra.

JURISDICTION

Invoking federal jurisdiction under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), Zavadils brought this suit in the United States District Court for the District of Nebraska. The United States filed a motion to dismiss for lack of subject matter jurisdiction pursuant to the immunity provisions of the Flood Control Act of 1928 ("the Act"), 33 U.S.C. § 702c. On April 11, 1989, the district court granted the United States' motion and dismissed Zavadils' complaint. See p. A-7, infra.

Zavadils appealed and the United States Court of Appeals for the Eighth Circuit, on July 11, 1990, entered a judgment and an opinion affirming the district court's judgment. See p. A-1, infra. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

33 U.S.C. § 702c. Expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights.

33 U.S.C. § 702c is reprinted in the appendix hereto, A-13, infra.

STATEMENT OF THE CASE

1. Nature of the Case

David Zavadil was rendered a quadriplegic on July 2, 1985, when he dove off a boat dock at the Lewis and Clark Recreation Area ("Recreation Area") on Lewis and Clark Lake.

Lewis and Clark Lake is a reservoir on the Nebraska-South Dakota border created by the construction of the Gavins Point Dam on the Missouri River by the United States for several purposes, including flood control, hydropower,

navigation, irrigation, domestic and sanitary water supply, recreation and fish and wildlife.

Zavadils alleged that the United States was responsible for the design, development, administration, operation and maintenance of the Recreation Area, and that Mr. Zavadil's injuries were caused by the negligence of the United States. Zavadils alleged twelve separate acts or omissions of negligence, including the improper design and location of the dock and ramp, the failure to dredge the area around the dock and ramp, the use of a movable (rather than fixed) dock on the ramp, the failure to prohibit swimming and diving in the area adjacent to the dock and ramp and the failure to warn of submerged hazards and shallow water.

The Recreation Area includes a number of smaller recreation units, including the Gavins Point Unit, at which the boat dock and concrete boat ramp are located. The Gavins Point Unit has numerous other recreational facilities, including a swimming beach, change house,

restrooms, shower houses, playground, picnic shelter, hiking trails, bicycle trails, equestrian trails, a fish cleaning station, archery range, amphitheater and campground. More than two million visitors use the Recreation Area each year.

The United States' stated policy in managing water resource development projects such as the Recreation Area and lake is to provide "the public with safe and healthful recreational opportunities." 36 C.F.R. § 327.1

There is a restricted area on the lake extending 200-300 feet above and below the powerhouse at the dam to prevent boats on the lake from being drawn into the powerhouse and spillway gates as water is being discharged from the lake. The accident site is located approximately one and one-half to two miles west (upriver) from the dam, powerhouse and spillway (approximately five miles by road).

The purpose of the dock and boat ramp centers on recreation and the United States admitted the

dock and ramp had nothing to do with the flood control purposes of the dam.

Although there was a sand beach immediately adjacent to both sides of the dock and ramp, the United States' regulations prohibited swimming and diving in the area.[1] (One of the Zavadils' allegations of negligence was the United States' failure to make the public aware of, and enforce, that regulation.)

The United States' employee responsible for enforcing the water safety rules at the lake was not even aware of this regulation. Another of the United States' employees testified that swimming is permitted throughout Lewis and Clark Lake and swimming and diving had no relationship to the flood control purpose of the project. Other than the restricted areas immediately

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[1]36 C.F.R. § 327.5(a) (1985) provides: "Swimming, diving, snorkeling or scuba diving at one's own risk is permitted, except at launching sites, designated mooring points and other areas so designated by the District Engineer. Diving or jumping from bridges or other structures which cross project waters is prohibited." (emphasis added)

above and below the dam, the United States' water safety program at Lewis and Clark Lake did not relate to the flood control purpose of the project.

The United States admitted the purpose of the boat ramp and dock is recreation, and that the boat dock and ramp had nothing to do with the flood control purpose of the dam and reservoir. The United States further admitted that removal of the dock and ramp at Gavins Point would have no effect on the flood control purposes of the project, and that the dredging activities (one of the Zavadils' allegations of negligence related to dredging) had nothing to do with the flood control purpose. The only apparent relation between the land in the Recreation Area and the flood control function of the project is that some of the land, which does not include the Gavins Point Unit, is used as an emergency spillway and to store riprap materials in the event of extremely high waters.

It is uncontested that there was no flooding or flood conditions at the entire project on the day of the accident.

The only evidence offered by the United States in support of its motion to dismiss was an affidavit of an employee of United States which simply stated that one of the purposes of the dam was to control flood waters and that the dam and lake are monitored daily to adjust water discharge rates when necessary for purposes including flood control

2. The District Court Ruling

The United States filed a motion to dismiss for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure Rule 12(b)(1), alleging the United States was immune from liability pursuant to section 702c of the Act.

The district court, noting that the Zavadils' response to the United States's motion to dismiss referenced certain depositions and exhibits, ordered that (barring objection from

the parties) it would treat the motion to dismiss as a motion for summary judgment. Following that order, no further evidence was presented by the parties. The district court then entered an Order and Judgment on April 11, 1989, accompanied by a Memorandum Opinion.

The district court cited this Court's decision in United States v. James, 478 U.S. 597 (1986), and focused on the language in James that the conveyance of warnings was part of the management of a flood control project. The district court interpreted James as precluding any federal government liability for injury in connection with a flood control project. Zavadils presented other claims of negligence which were not addressed by the district court.

3. The Eighth Circuit Decision

The Zavadils appealed to the Court of Appeals for the Eighth Circuit, which issued its opinion on July 11, 1990. The court of appeals likewise found this Court's decision in James to be controlling. The appellate court reasoned that

since the lake's water level was being monitored at the time of the accident for both flood control and navigation purposes, the lake's waters met the definition of flood waters within the terms of the Act. The court of appeals then held that since governmental control of the waters was "a substantial factor" in causing Mr. Zavadil's injuries, the immunity provision of section 702c applied and the court affirmed the district court's dismissal of the Zavadils' complaint.

REASONS FOR GRANTING THE WRIT

I.

A Conflict Exists Among the Various Circuit Courts of Appeal Regarding the Application of the Immunity Provisions of 33 U.S.C. § 702c (Flood Control Act of 1928).

This Petition presents one of the extremely rare circumstances where review by this Court is warranted. Not only does this case involve a true conflict among the various circuit courts of appeal, but it has a direct impact upon the rights of the tens of millions of annual

visitors to recreational areas within flood control projects throughout the nation.

The simple fact is that if Mr. Zavadil had made his dive at a flood control project located in the Fourth or Tenth Circuits, he would have an action against the United States pursuant to the Federal Tort Claims Act. Hayes v. United States, 585 F.2d 701 (4th Cir. 1978); Boyd V. United States, 881 F.2d 895 (10th Cir. 1989). Unfortunately for Mr. Zavadil, his injury occurred within the boundaries of the Eighth Circuit and the negligence of the United States government is shielded by the cloak of immunity. DeWitt Bank & Trust Co. v. United States, 878 F.2d 246 (8th Cir. 1989), cert. denied, ___ U.S. ____, 110 S.Ct. 1318 (1990). Likewise, if Mr. Zavadil would have been injured in the Third or Ninth Circuits, his claim would also be turned aside. Dawson v. United States, 894 F.2d 70 (3d Cir. 1990); McCarthy v. United States, 850 F.2d 558 (9th Cir. 1988), cert. denied, 489 U.S. 1052, 109 S.Ct 1312 (1989); Morici Corp. v.

United States, 681 F.2d 645 (9th Cir. 1982). Finally, while it is not entirely certain, it appears that immunity would also preclude this claim in the Seventh Circuit, although a different test is applied. Fryman v. United States, 901 F.2d 79 (7th Cir. 1990).[2] The geographic location of an injury must not be allowed to determine the outcome of an otherwise meritorious claim.

In Hayes, supra, the Fourth Circuit of Appeals reversed the district court's decision which relied on the immunity provisions of 33 U.S.C. § 702c. Hayes involved damage to property near the gates of a flood control project. The Fourth Circuit concluded that for immunity to apply, the action must "be in aid of the operation of the dam as a flood control facility." Id. at 702. The court went on to note: "If the plaintiff could prove damage to

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[2]The Plaintiff in Fryman has filed a Petition for a Writ of Certiorari, United States Supreme Court Case #90-147, which is pending.

his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c." Id. at 702-03.

Similarly, the Tenth Circuit in Boyd, supra, held that the immunity provisions of § 702c did not apply to a person struck and killed by a boat while snorkeling in the waters of a flood control project. The Tenth Circuit recognized the importance of this Court's decision in United States v. James, 478 U.S. 597 (1986), and correctly noted that § 702c "immunized the government from suit for any damages caused by floods or flood waters." Id. at 900 (emphasis added). The Boyd court went on, however, to distinguish the injuries in James from the injuries presented in Boyd and in this case:

> There is some broad language in James, but the Court appeared to distinguish cases where damages occur in waters not being actively used for flood control purposes, by twice noting that the district and appellate courts in that case had found that the waters were being released for flood control purposes at the time of the

> accident. Id. at 605 & n.7, 610, 106 S.Ct. at 3121 & n.7, 3123-24. Indeed, the Supreme Court quoted a portion of a Fourth Circuit case, and highlighted certain language; where the court had stated "[i]f the plaintiff could prove damage to his farm as the result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c." Id. at 605 n.7, 106 S.Ct. at 3121 n.7 (quoting Hayes v. United States, 585 F.2d 701, 702-03 (4th Cir. 1978)).

Id. (emphasis in original)

The Tenth Circuit in Boyd discussed the Ninth Circuit's decision in McCarthy, supra, and then clearly departed from the Ninth Circuit stating: "For our part, we cannot agree that Congress intended to stretch the shield of flood control immunity to the limit contemplated by [McCarthy]." Id.

> [The McCarthy] standard essentially creates a "but for" connection between flood control activity and damages occurring at a flood control project -- if the injury would not have occurred but for the creation of a flood control lake, the government is immune. Such a connection between flood control activity and recreational injuries is too attenuated to warrant the invocation of § 702c. The government has presented no evidence that Congress intended § 702c to cover this situation. We believe Congress' concern

> was to shield the government from liability associated with flood control operations, see James, 478 U.S. at 608, 106 S.Ct. at 3122-23, not liability associated with operating a recreational facility.

Id. It appears that the Third Circuit in Dawson, supra, and the Eighth Circuit in DeWitt have also sided with the McCarthy court.

The conflict in the circuits is further exacerbated by the different tests applied in various circuits. The Tenth Circuit looks to determine whether the liability is associated with flood control operations or with the operation of a recreational facility. The Ninth Circuit requires that the accident be "wholly unrelated" to flood control, while the Third and Eighth Circuits[3] look to whether the injuries were made more likely by the use of the lake in flood control operations. In Fryman v. United

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[3]The Eighth Circuit in rendering its opinion in this case seems to apply a "substantial factor" test stating: "Since governmental control of these waters was a substantial factor in causing the Zavadils' injuries the United States is immune from liability." Zavadil v. United States, 908 F.2d 336 (8th Cir. 1990).

States, 901 F.2d 79 (7th Cir. 1990), the Seventh Circuit appears to carve out yet another test somewhere between those applied by its sister circuits. Injured parties in the Seventh Circuit must look to whether "the problem is attributable in some substantial part to the nature of flood-control project" or whether the flood control activities increased "the probability of the injury compared with a natural lake devoted to recreational use."

The square and irreconcilable conflict between the circuits, coupled with the profound and ongoing impact on the fundamental rights of tens of millions of citizens provide compelling reasons for this Court to issue the extraordinary Writ of Certiorari requested by the Zavadils. See, e.g., McElroy v. United States, 455 U.S. 642, 643 (1982) (certiorari granted because of "a conflict among the circuits on this issue of statutory construction"); Marks v. United States, 430 U.S.

188, 189 (1977) (certiorari granted "to resolve a conflict in the circuits").

II.

The Decision Below Fails to Correctly Apply this Court's Decision in United States v. James Which Applies Immunity Only to Negligence Associated with Flood Control.

In James, this Court made it clear that if the immunity provision of 33 U.S.C. § 702c is to apply to insulate the negligent actions of the United States, those actions must be "related to flood control" (James, 478 U.S. at 605, 106 S.Ct. at 3121), "associated with flood control" (Id. at 608, 106 S.Ct. at 3122) or "to prevent flooding" (Id. at 605 n.7, 106 S.Ct. at 3121 n.7).

James involved a situation where boaters were swept up in flood waters being drawn through the flood control facilities. As this Court observed, the injuries resulted from the intentional release of flood waters from the reservoir as part of the flood control function. As a result, this Court in James did not address the question of immunity surrounding the purely

recreational operations within the bounds of a flood control facility. That is the issue squarely presented in this case.

While the question of liability for purely recreational operations was not determined in James, this Court held throughout the decision that an important distinction exists between recreational and flood control operations. This Court specifically stated: "We have noted that here the District Court in each case found that the waters were being released from federal flood control facilities to prevent flooding." Id. at 605 n.7, 106 S.Ct. at 3121 n.7. In that same footnote, this Court quoted with emphasis the following language from Hayes v. United States, 585 F.2d 701, 702-03 (4th Cir. 1978), a case which directly supports Zavadils' position in this case:

> If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c.

James, 478 U.S. at 605 n.7, 106 S.Ct. at 3121 n.7.

The Zavadils anticipate that the United States will direct this Court's attention to language in Part IV of the James decision, relating to liability for warnings. As the Eighth Circuit noted below, three of the Zavadils' causes of action center on the United States's failure to warn of underwater dangers at the dock area. Zavadil, 908 F.2d at 336 n.4. To support its holdings, the court of appeals quoted the following language from James: "[T]he manner in which to convey warnings, including the negligent failure to do so, is a part of the 'management' of a flood control project." Id. (citing James, 478 U.S. at 610, 106 S.Ct. at 3123). It is clear from the earlier recitation of facts that this statement applies only to warning of the dangers associated with flood control. The plaintiffs in James contended they should have been warned of the dangers of being swept up by flood control waters when the gates were opened to

release waters at flood stage. The holding regarding warnings was a logical extension of the earlier portion of the James opinion since both issues centered directly on the flood control operation of the project.

The Eighth Circuit below erroneously extended this holding regarding warnings to the negligent failure to warn of conditions unrelated to the flood control aspect of the project. This distinction between flood control and recreational warnings was specifically accepted by the district court in Denham v. United States, 646 F. Supp. 1021 (W.D. Tex. 1986), aff'd, 834 F.2d 518 (5th Cir. 1987).[4] In Denham, the plaintiff dove into the water, struck his head on a submerged abandoned concrete anchor and was rendered a quadriplegic. The injury occurred in a designated swimming area in a flood control reservoir.

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[4]The Fifth Circuit in Denham did not address the Act's immunity provision and affirmed the district court on other grounds.

The Denham district court reviewed the James decision and analyzed the case in terms of the "management" issue and the "causation" issue. The court, citing Hayes, supra, stated: "[T]he Flood Control Act does not bar an action against the United States under the FTCA when, as here, the plaintiff alleges an injury unconnected with the operation of the facility as a flood control project." 646 F. Supp. at 1026. The court further noted that the factual scenario presented in James was clearly distinguishable and stated that the claimant's

> alleged acts of negligence by the Government are not part of the management of the flood control project, but are instead part of the management of the dam as a recreational facility . . . . This Court believes that the management decision of whether to warn of a rapid current at the reservoir is wholly independent and distinguishable from the decision to warn of hidden dangers at a designated swimming area or to fail to at least attempt to remove dangerous obstacles from the bottom of the swimming area.

Id.

The Denham court noted three distinct factual contrasts with James, each of which is likewise

applicable here. First, in James, the current from the release of flood waters caused the injuries; in Denham and in the instant case, flooding played no part in the injuries. Second, the injuries in James were proximately caused by the dam and dam waters; the injuries in Denham and this case were caused by striking underwater obstructions. Third, the United States' negligence in James "dealt specifically with a danger created by a dam, while the danger created by the Corps in the instant case resulted from the Corps' operation of a recreational facility, and bears no relationship to a dam or control of flood waters." Id. at 1027.

In addition to the warning issue, both the district court and the court of appeals herein seem to imply that this action was based solely on a failure to warn. This is simply not the case since only three of the twelve allegations of negligence made by the Zavadils relate to lack of warnings. Most of the allegations

relate to the location, design, construction and maintenance of the concrete ramp and boat dock. Furthermore, the allegations bear no relation to flooding or flood control. The United States's own personnel agreed that swimming and diving had no relationship to the flood control purposes of the project and that the boat dock and ramp were also unrelated to flood control.

The legislative history of § 702c makes it clear that Congress intended to establish immunity should the massive flood control projects result in flooding and damage to private property. This aspect of the legislative history was extensively quoted in James. It is improbable, however, that Congress, in 1928, anticipated that some of the projects, such as the one at issue herein, would be exclusively promoted and used by tens of millions of people for recreational purposes.

In his James dissent, Justice Stevens, joined by Justice Marshall and Justice O'Connor, noted that he had reviewed the entire legislative

history of the Act and found absolutely no reference in either the Act or the legislative history to any potential liability for personal injuries. The inescapable conclusion is that Congress did not intend an absolute prohibition against liability for any and all acts and omissions of the United States occurring at flood control projects. Justice Stevens clearly illustrated this point in his James dissent:

> It defies belief--and ascribes to the Members of Congress a perverse, even barbaric, intent--to think that they spent days debating the measure of extra-constitutional compensation they would provide riparian landowners but intended--without a single word of dissent--to condemn the widows, orphans and injured victims of negligent operation of flood control projects to an irrational exclusion from the protection of the subsequently enacted Tort Claims Act.

James, 478 U.S. 620, 106 S.Ct. 3128 (Stevens, J. dissenting).

The passage is especially applicable to situations involving the recreational operation of those facilities.

CONCLUSION

This Petition for a Writ of Certiorari should be granted since a true conflict exists in the circuits affecting the substantial rights of millions of citizens and since the lower courts incorrectly applied a decision of this Court.

Respectfully submitted,

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October 9, 1990

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1813
DAVID B. ZAVADIL and
BARBARA ZAVADIL,

Plaintiff-Appellants,

v.

UNITED STATES OF AMERICA,
acting by and through the
DEPARTMENT OF ARMY, U.S.
ARMY CORPS OF ENGINEERS,

Defendant-Appellee.

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908 F.2d 334

Appeal from the United States District Court
for the District of Nebraska
No. CV 88-L-411-**Lyle E. Strom**, Chief Judge

ARGUED FEBRUARY 14, 1990-DECIDED JULY 11, 1990

Before LAY and BEAM, Circuit Judges, and HANSON, Senior District Judge*

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* Honorable William C. Hanson, Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

PER CURIAM.

David Zavadil was rendered a quadriplegic when he struck a submerged concrete boat ramp while diving from a dock located on Lewis and Clark Lake. The lake lies between Nebraska and South Dakota and is formed by the Gavins Point Dam, located on the Missouri river. The dam was built and is owned and operated by the United States Army Corps of Engineers.

David and his wife Barbara brought this tort action against the United States under the Federal Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2674 (1988), alleging that David's injuries were caused by the negligence of the government. The district court,[1] relying on United States v. James, 478 U.S. 597, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986), granted the government's motion for summary judgment. 715 F.Supp. 276. The court found that the government was immune from

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[1]The Honorable Lyle E. Strom, United States District Court Judge for the District of Nebraska.

liability under section 702c of the Flood Control Act of 1928.[2] We affirm.

In James, recreational users were injured or killed when they were swept through flood gates opened by the Corps to release flood waters. The Supreme Court held that the plaintiffs' tort actions against the United States were barred by section 702c. In doing so, the Supreme Court concluded that:

> Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from "any" liability associated with flood control. As the Court of Appeals for the Eighth Circuit explained three decades ago in National Mfg., § 702c's language "safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language."

James, 478 U.S. at 608, 106 S.Ct. at 3122-23 (quoting National Mfg. Co. v. United States, 210

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[2]33 U.S.C. § 702c provides that "No liability of any kind shall attached to or rest upon the United States for any damage from or by floods or flood waters at any place."

F.2d 263, 270 (8th Cir.), cert. denied, 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108 (1954)).[3]

We find James to be controlling in this case. There is no question that one of the purposes of the Gavins Point Dam was flood control and navigation. The record shows that at the time of the accident the water level was being monitored for flood control and navigational purposes. Thus, the lake's waters are "contained in . . . a federal flood control project for purposes of or related to flood control," James, 478 U.S. at 605, 106 S.Ct. at

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[3]The Court interpreted "floods or flood waters" in a broad sense. It stated:

> The Act concerns flood control projects designed to carry floodwaters. It is thus clear from § 702c's plain language that the terms "flood" and "flood waters" apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

James, 478 U.S. at 605, 106 S.Ct. at 3121.

3121, and section 702c is applicable. Id. Since governmental control of these waters was a substantial factor in causing the Zavadils' injuries the United States is immune from liability. Dewitt Bank & Trust Co. v. United States, 878 F.2d 246, 247 (8th Cir. 1989), cert. denied, _____ U.S. _____, 110 S.Ct. 1318, 108 L.Ed.2d 493 (1990); see McCarthy v. United States, 850 F.2d 558, 561-62 (9th Cir. 1988), cert. denied, _____ U.S. _____, 109 S.Ct. 1312, 103 L.Ed.2d 581 (1989).[4] Summary judgment was

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[4]The appellant relies upon the Boyd case from the tenth circuit which held that liability associated with the operation of a dam as a recreational facility by the government does not provide sovereign immunity under James. See Boyd v. United States ex rel. United States Army, Corps of Eng'rs, 881 F.2d 895, 900 (10th Cir. 1989); see also James, 478 U.S. at 605 n. 7, 106 S.Ct. at 3121 n. 7. This view has been repeatedly rejected by other circuits. See Dewitt, 878 F.2d at 247; Fryman v. United States, 901 F.2d 79, 81-82 (7th Cir. 1990); Dawson v. United States, 894 F.2d 70, 73-74 (3d Cir. 1990); Mocklin v. Orleans Levee Dist., 877 F.2d 427, 430 (5th Cir. 1989); McCarthy, 850 F.2d 561-62. Plaintiff asserts that the waters in the Gavins dam were being raised by the government for

appropriate and the judgment of the district court is affirmed.[5]

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recreational purposes for the 4th of July. We need not pass upon this distinction since the evidence is clear that the waters in Gavins dam were also being monitored for flood control and navigational purposes. See Fryman, 901 F.2d at 81-82. Included in the allegations of negligence made by the plaintiffs is the government's failure to warn of the abutment which plaintiff struck when he made his unfortunate dive. As the Supreme Court stated in James: "[T]he manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." James 478 U.S. at 610; see also Dewitt, 878 F.2d at 247.

[5]Plaintiffs argue for the first time on appeal that the application of section 702c in this case violates the qual protection clause by unconstitutionally discriminating against those persons injured at federal multipurpose water projects whose purposes include flood control and those injured at similar projects whose purposes do not include flood control. Because this claim was not raised before the district court it is not properly before this court and we shall not consider it. Estes v. United States, 883 F.2d 645, 648 (8th Cir. 1989) (following the general rule that this court will not consider issues not raised below).

IN THE UNITED STATES DISTRICT
FOR THE DISTRICT OF NEBRASKA

DAVID B. ZAVADIL and BARBARA ZAVADIL, Plaintiffs,	)	
v.	)	No. CV 88-L-411
UNITED STATES OF AMERICA, acting by and through the DEPARTMENT OF ARMY, U.S. ARMY CORPS OF ENGINEERS, Defendant.	)	

MEMORANDUM OPINION

This matter is before the Court on the defendants' motion to dismiss (Filing No. 6). Noting that plaintiffs' response referred to certain depositions and exhibits, the Court proceeds, pursuant to Fed.R.Civ. P. 12(b), to treat defendants' motion as a motion for summary judgment (Filing No. 22).[6]

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[6]The Court notes that defendants objected to the Court's consideration of the deposition and attachments of Peter C. Wegman and plaintiffs' request for judicial notice pursuant to Rule 201. However, given the disposition of this matter, the Court finds defendant's

Plaintiffs bring this suite against the United States, acting by and through the Department of Army, United States Army Corps of Engineers, for injuries incurred by David Zavadil on July 2, 1985, at Lewis and Clark Lake, Gavins Point Dam, South Dakota. Gavins Point Dam, behind which Lewis and Clark Lake was formed, was constructed by the United States Army corps of Engineers as part of the Pick-Sloan plan for development of the Missouri River Basin. A compromise agreement between the Senate and the House of Representatives in the Flood Control Act of 1944 specifically included the construction and development of the Gavins Point Dam. The report specifically noted that the construction of the dam was for the purpose of flood control. S.Doc. No. 247, 78th Cong., 2d Sess. 3 (1944):

> The use of the Garrison, High, Oahe, Big Bend, Fort Randall and Gavins Point Dams and Reservoirs will provide the desired degree of flood control, supply the needs

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objection moot.

> of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.

Id.

* * * * * *

> Development of the Missouri River Basis * * * will secure the maximum benefits for flood control, irrigation, navigation, power, domestic and sanitary purposes, wildlife and recreation.

Id.

It is alleged that Mr. Zavadil dove off of a boat dock located on a boat ramp at the Gavins Point Dam, sustaining a fractured dislocation of the spine at C-5 through C-6 level, resulting in quadriplegia. Plaintiffs' action is brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671, et seq.

The United States relies on 33 U.S.C. § 702c in support of its position that it is immune from suit in this action. Section 702c states, in pertinent part: "[N]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters in any place."

The extent of the immunity afforded by § 702c was considered and delineated in United States v. James, 478 U.S. 597, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986). The clear import of James is that § 702c immunity extends to this case. In James, the Supreme Court held: "the terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control as well as to waters that such projects cannot control." Id. at 605, 106 S.Ct. at 3121.

In this case, as in James, the plaintiffs argue that § 702c was intended to grant immunity only in connection with government operation of flood control projects and that this immunity does not extend to injuries arising from mismanagement of recreational activities wholly unrelated to flood control. However, the James Court concluded that the manner in which the government chooses to convey warnings related to recreational activities, including the negligent

failure to do so, is part of the management of the flood control project. Id. at 609-10, 106 S.Ct. at 3123. Accord Richey v. United States, 674 F.Supp. 780 (1987).

Drawing upon the legislative history of the statute, the James Court concluded that Congress clearly intended to protect the United States from becoming liable for any expense other than the direct cost of construction of a flood control project.

> Congress clearly sought to insure beyond doubt that sovereign immunity would protect the Government from 'any liability associated with flood control.' As the Court of Appeals for the Eighth Circuit explained three decades ago in National Mfg., § 702c's language 'safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language.

James, 478 U.S. at 608, 106 S.Ct. at 3122-23 (quoting National Mfg. Co. v. United States, 210 F.2d 263, 270 (8th Cir. 1954)).

Summary judgment is proper if there is no genuine issue of material fact and the moving party should prevail as a matter of law. Fed.R.Civ.P. 56(c). Upon review of a motion for

summary judgment, this Court must give the party opposing the motion the benefit of all favorable factual inferences. Holloway v. Lockhart, 813 F.2d 874, 878 (8th Cir. 1987).

After careful review of this matter and the briefs and supporting evidence submitted by the parties, the Court finds that plaintiffs' action is barred by 33 U.S.C. § 702c.

A separate order will be entered this date in conformity with this memorandum opinion.

TITLE 33 - NAVIGATION AND
NAVIGABLE WATERS
CHAPTER 15. FLOOD CONTROL
33 U.S.C. § 702c (1980)

§ 702c. Expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights

Except when authorized by the Secretary of War [Secretary of the Army] upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of War [Secretary of the Army] that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the

United States, all rights-of-way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: Provided, however, that if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War [Army] and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either

the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

(May 15, 1928, ch 569, § 3, 45 Stat. 535.)

(2)

No. 90-737

Supreme Court, U.S.
FILED
JAN 7 1991
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

DAVID B. ZAVADIL and BARBARA ZAVADIL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 33 U.S.C. 702c, which provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place," bars petitioners' action under the Federal Tort Claims Act for damages arising from injuries suffered in a lake created by a federal flood control dam.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 908 F.2d 334. The opinion of the district court (Pet. App. A7-A15) is reported at 715 F. Supp. 276.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1990. The petition for a writ of certiorari was filed on October 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner David Zavadil was seriously injured when he dove from a dock into a federal flood control lake and struck a submerged concrete boat ramp. The district court dismissed the complaint, holding that it was barred by the Flood Control Act of 1928, 33 U.S.C. 702c. Pet. App. A7-A12. The court of appeals affirmed. *Id.* at A1-A6.

1. Lewis and Clark Lake, which is located between Nebraska and South Dakota, consists of waters confined by the Gavins Point Dam on the Missouri River. Pet. App. A2. The Army Corps of Engineers built the dam and continues to own and operate it. *Ibid.* The dam was constructed as part of the Pick-Sloan plan for the development of the Missouri River basin. *Id.* at A8. When Congress authorized the construction of the dam, it made clear that the dam's purposes included flood control:

> The use of the Garrison, High, Oahe, Big Bend, Fort Randall and Gavins Point Dams and Reservoirs will provide the desired degree of flood control, supply the needs of irrigation as well as furnish cyclic storage for navigation during prolonged drought periods.

Pet. App. A8-A9 (quoting S. Doc. No. 247, 78th Cong., 2d Sess. 3-4 (1944)). The Corps of Engineers monitors the water level in the lake and adjusts water discharge rates when necessary for the dam's purposes, including flood control. Pet. App. A4.

There are recreational areas on the lake. Petitioner was injured at one of those areas when he dove into the lake from a dock. Pet. App. A2. The Corps' regulations prohibited diving at the site of the injury, 36 C.F.R. 327.5(a), and there was a sign at the end of the dock warning members of the public

to swim only in designated areas, to wear a life preserver, and to be alert for underwater obstructions. Gov't C.A. Br. 6. Petitioners have alleged that the government was negligent in failing to make the public aware of, and to enforce, the regulation. See Pet. 6-7.

2. Petitioners filed an action under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in the United States District Court for the District of Nebraska, alleging that the government's negligence caused the injury. The government moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the United States was immune under the Flood Control Act of 1928, 33 U.S.C. 702c. The district court granted the motion, holding that Section 702c barred the suit. Pet. App. A7-A12.

Section 702 provides, in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *.

The district court noted that this Court had "considered and delineated" the scope of Section 702c in *United States* v. *James*, 478 U.S. 597 (1986); the "clear import of *James*," the district court concluded, was that "§ 702c immunity extends to this case." Pet. App. A9-A10.

3. The court of appeals affirmed, holding that *James* was "controlling in this case." Pet. App. A4. The court found that "[t]here is no question that one of the purposes of the Gavins Point Dam was flood control" and that "[t]he record shows that at the time of the accident the water level was being monitored for flood control and navigational purposes." *Ibid.* Thus, the court concluded, "the lake's waters are 'contained in * * * a federal flood control project

for purposes of or related to flood control' " and "section 702c is applicable." *Id.* at A4-A5 (quoting *James*, 478 U.S. at 605). "Since governmental control of these waters was a substantial factor in causing [petitioners'] injuries," the court held, "the United States is immune from liability." Pet. App. A5.

ARGUMENT

As petitioners note (Pet. ii), this case presents the same question that the Court declined to hear earlier this Term in *Fryman* v. *United States*, 111 S. Ct. 295 (1990) (No. 90-147). There is no conflict among the circuits that calls for this Court's review, and, as both lower courts held, the reasoning of *James* mandated dismissal of the action. Further review is not warranted.

1. This is the latest in a series of cases in which Section 702c has been held to bar claims arising from recreational accidents in federal flood control lakes. In addition to the Eighth Circuit, the Third, Seventh, and Ninth Circuits have concluded that Section 702c confers immunity from claims arising from alleged negligence in the operation of recreational facilities included within federal flood control projects. See *Dawson* v. *United States*, 894 F.2d 70 (3d Cir. 1990); *Fryman* v. *United States*, 901 F.2d 79 (7th Cir.), cert. denied, 111 S. Ct. 295 (1990); *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d 246 (8th Cir. 1989), cert. denied, 110 S. Ct. 1318 (1990); *McCarthy* v. *United States*, 850 F.2d 558, 561 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989). Similarly, in *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d 427, 430 n.6 (1989), the Fifth Circuit held that Section 702c foreclosed a claim against the government arising out of a drowning in a channel that

had been dredged to facilitate the movement of equipment needed for the construction of flood control levees.[1]

Like the court of appeals here, the courts in all of those cases concluded that the waters in which the injuries occurred were "flood waters" for purposes of Section 702c; each court also held that the statute, as construed in *James*, conferred immunity on the United States notwithstanding allegations that injuries resulted from negligence unrelated to flood control. Pet. App. A5-A6 & n.4; *Dawson* v *United States*, 894 F.2d at 73-74; *Mocklin* v. *Orleans Levee District*, 877 F.2d at 428-430 & n.6; *Fryman* v. *United States*, 901 F.2d at 81; *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d at 247; *McCarthy* v. *United States*, 850 F.2d at 561-563. (In three of these cases, *Fryman*, *McCarthy*, and *Dewitt*, this Court denied petitions for certiorari seeking further review of the same question as that presented here.)

These decisions are fully justified by the language of the Flood Control Act and by the Court's reasoning in *James*. Section 702c provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * *." In *James*, this Court held that the terms "flood" and "flood waters" (478 U.S. at 605)

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[1] In light of *Mocklin*, *Denham* v. *United States*, 646 F. Supp. 1021, 1026 (W.D. Tex. 1986) (limiting flood control immunity to cases in which a plaintiff's injuries are attributable to "the management of a flood control project" or "the operation of [a] dam as a flood control project"), aff'd on other grounds, 834 F.2d 518 (5th Cir. 1987), has no further vitality. Compare Pet. 20-22.

> apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control.

As the court of appeals noted (Pet. App. A4), there is no question that the waters retained by the Gavins Point Dam in which the injury occurred are encompassed by this definition of "flood waters."

The immunity conferred by Section 702c does not depend on how a plaintiff may seek to characterize the government's negligence. In *James*, this Court stressed that Section 702c extends to liability of "*any* kind * * * for *any* damage from or by floods or flood waters at *any* place" and observed that it is "difficult to imagine broader language." 478 U.S. at 604 (emphasis in original). The legislative history, *James* added, shows "that the sweeping language of § 702c was no drafting inadvertence" and that "Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the Government from 'any' liability associated with flood control." *Id.* at 608. Section 702c "safeguard[s] the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language." *Ibid.* (quoting *National Mfg. Co.* v. *United States*, 210 F.2d 263, 270 (8th Cir.), cert. denied, 347 U.S. 967 (1954)).[2]

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[2] Petitioner strings together brief excerpts from *James* in an attempt to suggest a limitation on the Court's interpretation of the statute. Pet. 17. None of those phrases supports the limitation petitioner advocates. For instance, "related to flood control" appeared in a sentence describing flood waters: "[T]he terms 'flood' and 'flood waters' apply to all waters contained in or carried through a federal flood control project for purposes of or *related to flood control*, as well as to waters that such projects cannot control." 478 U.S. at 605 (emphasis added).

The immunity for "any damage from or by * * * flood waters" is available even when the government's negligence is said to involve "purely recreational operations" (Pet. 18). Indeed, one of the decisions reversed in *James* had held that the government was not immune if "a producing cause of the damage or injury is a government employee's negligence in omissions or commissions that diverge from acts strictly for the purpose of controlling floods or floodwaters." *James* v. *United States*, 760 F.2d 590, 603 (5th Cir. 1985). This Court's decision in *James* must be taken as a rejection of that test. Similarly, *James* made clear that Section 702c extends to claims framed in terms of failures to warn recreational users of hazards on flood control lakes, explaining that "the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." 478 U.S. at 609-610.

As a practical matter, an interpretation that sought to limit Section 702c to allegedly negligent flood control operations would be unworkable. As the Seventh Circuit recognized in *Fryman*, such an approach would "enable parties to avoid *James* by playing word games." 901 F.2d at 81. The Ninth Circuit has also emphasized the impracticability of attempting to distinguish "between the active and passive operations of federal flood control facilities," recognizing that "a passive condition is invariably the result of other active forces which have gone before." *McCarthy* v. *United States*, 850 F.2d at 561. In this case, the government's immunity should not be affected by the manner in which the complaint characterizes the negligence responsible for the accident. See Pet. 4.

Contrary to petitioner's contention (Pet. 18), *James*'s passing reference—in a string citation in a footnote, 478 U.S. at 605-606 n.7—to *Hayes* v. *United*

States, 585 F.2d 701 (4th Cir. 1978), does not suggest otherwise.[3] As we have demonstrated, the reasoning of *James* is inconsistent with any effort to limit the Flood Control Act to active flood control operations; the Court cannot fairly be deemed to have adopted a fundamentally different understanding of the statute by means of a footnote citation to *Hayes*. In fact, the same footnote cited *Morici Corp.* v. *United States*, 681 F.2d 645 (1982), a case in which the Ninth Circuit specifically rejected the *Hayes* court's suggestion that flood control immunity depends on "the particular use to which the project was being put when the negligence occurred" (681 F.2d at 647).

2. There is no conflict among the courts of appeals calling for this Court's review. In *Boyd* v. *United States*, 881 F.2d 895 (10th Cir. 1989), a swimmer snorkeling in a flood control lake was struck and killed by a power boat; his complaint alleged that the government was negligent in failing to warn swimmers that boating was permitted in the area in which the accident occurred and in failing to zone the lake to prohibit boating in that area. Although the court

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[3] *Hayes* was a two-page decision reversing the dismissal of a complaint that alleged that the plaintiff's land had been eroded by releases of water from a dual-purpose dam. Distinguishing between "flooding which allegedly occurred because of the government's anti-flooding activity" and "flooding caused by a federal project unrelated to flood control," *Hayes* remanded for further proceedings because it was "not inconceivable that all or some of the releases were solely for the purpose of promoting recreational use of the impounded waters and not in the least in aid of the operation of the dam as a flood control facility." 585 F.2d at 702. In the 12 years since *Hayes* was decided, the Fourth Circuit has neither elaborated upon this test nor applied it beyond the facts of *Hayes* itself.

of appeals concluded that Section 702c did not bar the suit and criticized the Ninth Circuit's interpretation of Section 702c,[4] the Tenth Circuit's holding was very narrow (881 F.2d at 900):

> Without attempting to delineate for every conceivable situation the necessary link between flood control activities and injuries sustained at a flood control project before § 702c immunity applies, in the present case we hold that the requisite nexus has not been established.

Although *Boyd* indicated that some "nexus" between flood control activities and injuries at a flood control lake—beyond "but for" causation—would be required to sustain immunity under Section 702c, the Tenth Circuit has never applied its approach beyond the particular facts of *Boyd*. In the instant case, the court of appeals determined that "governmental control of [waters in Lewis and Clark Lake] was a substantial factor in causing [petitioners'] injuries." Pet. App. A5. In view of the decisions that have reached the same conclusion on similar facts, the Tenth Circuit might well regard the "substantial factor" recognized in those cases as establishing the "nexus" required by *Boyd*.[5]

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[4] The Tenth Circuit understood the Ninth Circuit's decision in *McCarthy* v. *United States*, *supra*, to require only a " 'but for' connection between flood control activity and damages occurring at a flood control project." 881 F.2d at 900. The Tenth Circuit maintained that a "but for" standard was inconsistent with its understanding of Section 702c's purpose—"to shield the government from liability associated with flood control operations * * * not liability associated with operating a recreational facility." 881 F.2d 900.

[5] See *Dawson* v. *United States*, 894 F.2d at 74 (noting that "daily variation in the water depth * * * was in part due to

Nor is there any conflict between the decision in this case and the rationale of *Fryman* v. *United States*, *supra*. See Pet. 15-16. In *Fryman*, the Seventh Circuit held that Section 702c barred a claim very similar to petitioners'. Although the *Fryman* court reserved the question "whether a recreational injury on a flood-control lake could be actionable under the FTCA when the flood-control activities did not increase the probability of the injury compared with a natural lake devoted to recreational use" (901 F.2d at 82), the court here determined that governmental control of the waters in Lewis and Clark Lake was a "substantial factor" in causing the injury at issue. Thus, whatever the Seventh Circuit's resolution of the question left open in *Fryman*, there is no

releases by the Corps for flood control purposes"; thus, "'governmental control of flood waters was a substantial factor' in causing" the accident); *Mocklin* v. *Orleans Levee Dist.*, 877 F.2d at 428-430 & n.6 (noting that it was "clear * * * that the water in the flotation channel causally did contribute to the [accident]": a channel dredged to facilitate construction of a flood control project "created a significant dropoff in the lake"); *Dewitt Bank & Trust Co.* v. *United States*, 878 F.2d at 247 ("In operating the project for flood control and navigation, the Corps maintained the waters at this shallow level. Thus, governmental control of flood waters was a substantial factor in causing [the plaintiff's] injuries."); *McCarthy* v. *United States*, 850 F.2d at 561 (noting that "[a]lthough [plaintiff's] injury did not result from a perceptibly active operation of the flood control facility, the record does indicate ongoing monitoring and discharge of water levels at the Lake, activities which even formed part of [the plaintiff's] complaint for negligence"). The cited passages refute petitioners' suggestion (Pet. 15-16) that those cases have adopted widely divergent tests.

reason to believe that court would reach a different result on the facts of this case.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1991

[6] The Fourth Circuit's decision in *Hayes* v. *United States*, *supra*, was decided before this Court's decision in *James*. Since *James*, the Fourth Circuit has not had occasion to consider the significance of that decision or to apply Section 702c. Under these circumstances, there is no need for this Court to address any potential conflict between *Hayes* and decisions of other courts of appeals.

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